TESTIMONY OF MARK C. VAN NORMAN
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Good morning. Mr. Chairman, Mr. Vice-Chairman, and Members of the Committee, I am Mark Van Norman, Director of the Office of Tribal Justice, Department of Justice.

Thank you for inviting the Department to testify concerning the Indian Arts and Crafts Act. Let me begin by saying that the Department of Justice recognizes the importance of working with Indian tribes on a government-to-government basis to address problems in Indian country. Congress and the Executive Branch acknowledge the crucial role that promoting economic development plays toward meeting Indian country needs. Economic development opportunities can enhance the resources available to tribal governments for addressing the problems they face, including law enforcement problems. Moreover, the lack of economic opportunities in Indian communities, as in any community, can generate significant social problems, not the least of which are those related to crime problems.

For those reasons, the Department of Justice has worked cooperatively with other federal agencies to promote Indian country economic development. In August 1998, the Department of Justice participated in the White House conference on "Building Economic Self-Determination in Indian Communities." The President, the Attorney General, and the Secretaries of Agriculture, Housing and Urban Development, and Interior addressed the conference attendees, emphasizing the importance of tribal economic development to the Administration, including the Department of Justice. In particular, the Attorney General noted the importance of promoting strong tribal law enforcement and tribal courts to provide a positive environment for business development in

Indian country. Also, as an outgrowth of this conference, the Department of Justice, along with all other cabinet-level agencies, will participate in the creation of an "Access Center," which will provide phone-in callers with a "one-stop" source of information on federal programs to promote Indian economic development.

The conference also featured unique mention of the Indian arts and crafts industry. Dominic Ortiz, the young Native American man who introduced President Clinton at the conference, was financing his college education through his Indian arts and crafts business. Mr. Ortiz explained in regard to his business that:

> I have a business story I must tell because American Indian Business Leaders made my dream of creating a wholesale network of Native American arts and crafts a reality.
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> I began my journey into the free market about two years ago, with the hopes of raising enough funds so that I could attend law school at the turn of the century. And I began this summer with the distribution of Native American jewelry to seven states and a contract to supply one of the largest casinos in Kansas, the Kickapoo Nation, with a retail jewelry store in order to provide jobs and increase revenues.

This is just one of the many examples of the opportunities that the Indian arts and crafts industry provides to Native Americans.

The Indian arts and crafts industry is an important source of economic development in Indian country. The House Report accompanying the 1990 amendments to the Indian Arts and Crafts Act notes that "[t]his industry's value has been estimated at $400-$800 million annually,"[1] and apparently this industry is growing. An April 1998 article in USA Today reported that Americans and foreign tourists spend as much as $1 billion each year on Native American arts and

[1] House Report 101-400(I), 101st Cong., __ Sess. (1990) at 5.

crafts.[2] The same article reports that the average family that visits a New Mexico Indian Reservation spends $191 on arts and crafts. The Indian arts and crafts industry is, in many respects, one of the best examples of grass roots entrepreneurship. It takes advantage of, and promotes, tribal culture and traditional artisan skills, and requires minimal capital outlay. Arts and crafts can be marketed through the mail or by other means that minimize barriers to economic development, such as remoteness or lack of local infrastructure, that often impede other economic efforts. It also promotes national unity, affording opportunities for people to learn about Native American traditions through the items they purchase, thereby bringing people closer together.

The Federal Government has a longstanding policy of working to promote this industry. The Indian Arts and Crafts Act was first enacted in 1935 to promote Indian economic welfare through the development of arts and crafts and the expansion of their market. The 1935 Actcreated the Indian Arts and Crafts Board within the Department of the Interior. It recognized the importance to this industry of promoting product genuineness by, among other things, empowering the Board "to create Government trademarks of genuineness" for Indian-made products. The 1935 Act also included criminal provisions to protect the market for genuine Indian-made arts and crafts. These criminal provisions made it a misdemeanor to counterfeit trademarks issued by the Board, to make a false statement to obtain a Board trademark, and to sell products as Indian products when the seller knew they were not.[3] Those violations were

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[2] "$1 billion industry reeling as faux crafts flood market," USA Today, April 8, 1998 at 1A.

[3] P.L. 74-355, secs. 5-6, 49 Stat. 892-93.

subjected persons to imprisonment of up to six months and fines up to $2000.[4]

Congress amended the Act again in 1990 to enhance the protections it afforded against false claims that products are Indian-made. The 1990 amendments created a civil cause of action and enhanced the criminal causes of action. The 1990 amendments also expanded the Board's powers, including the addition of powers relating to the Act's enforcement provisions. Section 5 of the Act authorizes the Board to refer complaints that goods are falsely being sold as Indian-made to the FBI for investigation, to review the investigation report, and to recommend to the Attorney General that criminal proceedings be instituted.[5] Section 5 also authorizes the Board to recommend to the Secretary of the Interior that he request the Attorney General to institute a civil action under the Act.

The Act's criminal provisions, after 1990 amendments, make it a felony to counterfeit or falsely obtain Board trademarks and a felony to "knowingly" "offer or display for sale or sell any good . . . in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization."[6] Persons who violate the prohibition against falsely selling goods as Indian-made may be fined up to $250,000 and imprisoned up to five years for first violations, and fined up to $1 million and imprisoned up to fifteen years for subsequent violations. Corporations face fines of up to $1 million or $5 million for first and subsequent violations.

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[4] In 1948, Congress amended the criminal provisions to reduce the maximum fine to $500. 62 Stat. 759.

[5] 25 U.S.C. sec. 305d.

[6] 18 U.S.C. sec. 1159.

The Act defines "Indian tribe" to include federal- and state-recognized tribes and defines "Indian arts and crafts organization" to mean an "arts and crafts marketing organization composed of members of Indian tribes." "Indian" is defined to mean a member of a tribe or persons who a tribe certifies as "an Indian artisan." The Act also authorizes the Secretary of the Interior to define by regulation the terms "Indian product" and "product of a particular Indian tribe." The 1990 amendments also enhanced the penalties for counterfeiting Board trademarks and making false statements to obtain those trademarks to up to five years' imprisonment for individuals and fines up to $1 million for corporations convicted of first violations, and up to fifteen years and $1 million for individuals and $5 million for corporations convicted of subsequent violations.

With respect to civil remedies, the 1990 Amendments authorize either the Attorney General, upon the request of the Secretary of the Interior, or Indian tribes to bring actions against persons who sell goods or display them in a manner that falsely suggests they are Indian produced.[7] Upon proving a violation, the Attorney General or the tribe may obtain an injunction and recover the greater of treble damages resulting from the violation or $1000 for each day the product is offered or displayed, punitive damages, costs, and attorneys' fees. Fines or damages recovered in those actions are to be paid to the tribe, individual Indian, or arts and crafts organization that suffered damage as a result of the violations.

In recent years, the Department has undertaken several enforcement activities under the Act through United States Attorney's Offices. In 1998, the District of South Dakota filed an indictment against a defendant who sold goods to the Journey Museum in Rapid City and to

[7] 25 U.S.C. sec. 305e.

Korczak's Heritage, Inc., a shop near the proposed Crazy Horse Monument in the Black Hills, in a manner that falsely suggested they were Indian produced. The defendant pled guilty to a separate offense charged in the same indictment and, as part of the plea agreement, agreed to remove the words "NATIVE AMERICAN" from all goods he produces and to cease making any claim to being an Indian as part of any efforts to sell products he makes.

In 1993, the District of New Mexico received a referral that a retailer was falsely selling items as Indian-made. The case was prosecuted in 1994, resulting in a diversionary disposition.[8] That district also reports receiving referrals in other instances but declining to prosecute them for lack of evidence.

The District of Utah received a complaint from a tourist who purchased a belt buckle after being told by a store clerk that it was Hopi-made when in fact it was not. After investigation, no charges were filed because there was insufficient evidence to determine that the store clerk made the statement intentionally and the store offered a full refund.

In 1994, the District of Arizona investigated a case stemming from the discovery by a well-known Hopi artist of copies of a piece of his jewelry for sale in an Arizona retail store. The jewelry in question had been made from a wax mold created from the artist's original work at the behest of a wholesaler, who then sold them to the retailer where the artist discovered them for sale. After investigation, it appeared that the retailer believed, based on his examination of the items, that the items were actually Native American-made, and therefore he was not "knowingly" violating the Act. The evidence suggested, meanwhile, that the wholesaler made no statements to

[8] The U.S. Attorney's Office does not retain files dating back to 1994, so we could not confirm whether the case was charged under 18 U.S.C. sec. 1159 or another statute.

the retailer about the origin of the jewelry, making it difficult to prove that the wholesaler "knowingly" sold the work in a way that "falsely suggested" an Indian origin, and prosecution was declined. The Indian artist, however, was able to pursue a civil action against the wholesaler.

The U.S. Attorney's Office for the District of Minnesota reports dealing with complaints informally by referring them to Interior who, in turn, contacts the vendor involved and explains the legal issues related to representing items as Indian arts and crafts.

As these examples suggest, one reason why convictions may be difficult to obtain under the Act is the requirement that the defendant "knowingly" violate the Act. While it is provable that a product is being sold as an "Indian product" when it is not, it is more difficult to gather evidence and then prove that the seller actually knew at the time of transfer that the product was not an "Indian product."

In regard to its civil provisions, the Act is enforceable by either the Attorney General or an Indian tribe. Recognizing Interior's and the Board's expertise in these areas, the Act authorizes the Attorney General to bring actions under the Act "upon request of the Secretary of the Interior" and authorizes the Board to "recommend that the Secretary of the Interior refer . . . matter[s] to the Attorney General for civil action."[9] To date, the Secretary has not requested the Attorney General to initiate a civil action under the Act, so the Attorney General has not pursued any. The Ho-Chunk Nation, as an Indian tribe also authorized to pursue actions under the Act, has initiated a number of these actions. The Ho-Chunk Nation's claims survived constitutional and standing challenges before the district court. I note that the Ho-Chunk Nation's President is

[9] 25 U.S.C. sec. 305d.

also here to testify, and we look forward to hearing about the Ho-Chunk Nation's experiences under the Act's civil enforcement provisions.

With respect to the federal government, the Act envisions coordinated enforcement responsibilities between the Board, the Department of the Interior, and the Justice Department. As I noted earlier, the Act authorizes the Board to receive complaints and refer them to the FBI for investigation, then review the investigation reports and make recommendations to the Attorney General concerning criminal enforcement. The Act also authorizes the Board to recommend to the Secretary of the Interior that he request the Attorney General to initiate a civil action. In addition, to ensure that the Act and its requirements are receiving the full attention that they are due, the Departments of Justice and Interior have initiated inter-agency discussions concerning enforcement of the Act. We are exploring the possibility of developing an inter-agency memorandum of understanding to formalize internal procedures for carrying out our agencies' respective roles under the Act. In addition, the Board has developed and disseminated materials to educate tribes and the public about protections the Act affords against false claims that goods are Indian produced. In October 1996, Interior promulgated regulations defining key terms in the Act and setting forth how to file complaints of violations. And, recently, the Board has filled the vacancies among its Commissioners and acquired additional full-time staff. Those efforts will lead to increased efforts to promote the important policies reflected in the Act.

I should also note that there are other relevant legal protections available against false claims that arts and crafts products are Indian produced. Section 5 of the Federal Trade Commission Act makes unlawful "unfair and deceptive acts and practices in or affecting

commerce."[10] In 1996, the Federal Trade Commission enforced that provision by filing an action in federal district court in the Western District of Washington against two persons who falsely represented Native American-style carvings as authentic Native Alaskan-made artwork. The defendants sold those carvings wholesale to retail shops throughout Washington and Alaska and from one of the defendants' retail stores. Those carvings typically sold at retail for prices between $250 and $500. The defendants submitted to a consent decree requiring them each to pay $20,000 fines and to undertake specific measures to prevent them from continuing to deceive purchasers of the origin of their products. I have submitted a copy of a press release from the Federal Trade Commission that more completely describes that action for inclusion in the record with my testimony today.

In addition, section 1907(c) of the Omnibus Trade and Competitiveness Act of 1988,[11] directs the Secretary of the Treasury to "prescribe and implement regulations" to require country of origin marking for Native American-style jewelry, arts and crafts. Those regulations are set forth in Title 19 of the Code of Federal Regulations, section 134.43. In current form, they require permanent marking on imported products that incorporate Native American design or "could possibly be mistaken for . . . [goods] made by Native Americans."[12] They require permanent or indelible marking, except when the country of origin is a NAFTA country or where "it is technically or commercially infeasible" to do so, in which case string tags or adhesive labels may

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[10] 15 U.S.C. sec. 45.

[11] P.L. 100-418, sec. 1907(c), 102 Stat. 1315.

[12] 19 C.F.R. sections 134.43(c)(1), (d)(1).

be used.[13] The Committee may wish to examine whether the exception allowing for adhesive or string tags, which are easily removable once an item enters the United States, whenever a more permanent tag is "commercially infeasible" allows importers to inappropriately circumvent the protection this regulation provides. The Committee may also wish to consider whether a statutory provision further defining "commercially infeasible" in these circumstances might be appropriate.

In addition to these federal protections, a number of states have enacted provisions that specifically protect against false claims that products are Indian-made,[14] while many more have general consumer protection statutes to address false sales claims of all kinds that might be applied against false claims that products are Indian-made.

Again, I thank the Committee for the opportunity to present testimony today. The Indian arts and crafts industry is an important part of Indian country economic development. That being the case, the protections the Act affords the Indian arts and crafts industry reflect an important part of the Federal Government's policy of promoting that economic development.

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[13] 19 C.F.R. sections 134.43(c)(3), (d)(3).

[14] See, e.g., Ak. Stats. secs. 45.54.010 et seq.; Ariz. Rev. Stat. Ann. secs. 44-1231 to 44-1231.05; Cal. Ann. sec. 17569; N.M. Stat. Ann. secs. 30-33-1 to 30-33-11.